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Conservative Feminism

Hon. Richard A. Posner†

My title may seem an oxymoron: Does not conservatism imply the rejection of feminism? Some brands of conservatism do; many social and religious conservatives believe that a woman's place is in the home. No one harboring such a belief would be likely to describe himself or herself as a feminist. But conservatives who consider themselves libertarians—conservatives in the classical liberal tradition of Adam Smith, John Stuart Mill (a distinguished feminist), Herbert Spencer (another pioneering feminist¹) and Milton Friedman—do not believe that law or government should prescribe a particular role for women or discourage them from exercising free choice regarding occupation, marriage, and style of life. Nor, however, do they believe that women should be put ahead of men or encouraged to lead separate lives from men, or that “what's good for women” should be the lodestar for social governance instead of “what's good for the United States” or “what's good for humankind.” Nor do they have much faith in the power of government to put things right. The libertarian, noting that the history of legislation and common law with respect to women has indeed been one of oppression and discrimination, is not optimistic that the law can be flipped over and become an engine of liberation. The libertarian also notes that women are so large and diverse a part of the population and their welfare is so entwined with men—particularly their sons, husbands, fathers, and brothers—that it is hard to imagine what kind of legislation or legal rules could be devised that would benefit women as a group, unless society as a whole benefited.

So what is “conservative feminism”? It is, I suggest, the idea

† Judge, United States Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School. This is the revised text of remarks delivered on October 15, 1988, at the Symposium on Feminism in the Law: Theory, Practice and Criticism, sponsored by *The University of Chicago Legal Forum*. The helpful comments of Frank Easterbrook, Richard Epstein, William Landes, Edward Lazear, Stephen McAllister, Charlene Posner, Judith Resnik, Eva Saks and Cass Sunstein, and the research assistance of Ricardo Barrera, are gratefully acknowledged.

¹ See the much-maligned Herbert Spencer, *Social Statics* ch 16 (Robert Schalkenbach Foundation, 1954) (advocating equal rights for women).

that women are entitled to political, legal, social, and economic equality to men, in the framework of a lightly regulated market economy. It is the libertarian approach to issues of feminist jurisprudence, provided that "libertarian" is understood to refer to a strong commitment to markets rather than to some natural-rights or other philosophical underpinning of such a commitment. The implications of such an approach are not limited to narrowly "economic" issues such as comparable worth, although those issues are important and some are neglected by other forms of feminism. The implications extend, as we shall see, to the headiest heights of jurisprudential speculation, where the question whether women have a fundamentally different outlook on law from men is being debated. My discussion is in three parts: employment; the family and sex; and the nature of law.

I. EMPLOYMENT

There should be no legal barriers to the employment of women. Laws that forbade women to work in dangerous occupations, or to work as long hours as men,² were for the most part either paternalistic or designed to reduce competition faced by male workers.³ This was eventually recognized, and the laws have been repealed; but a subtler barrier to female employment remains. I refer to the fact that housewives' imputed earnings are not taxed. This may seem an esoteric and impractical—if not downright provocative—topic with which to begin an examination of feminist jurisprudence; but we shall see that it illustrates the limitations of more familiar forms of feminist jurisprudence and social thought.

It is plain that housewives do useful work, in the sense of work for which families pay—as by forgoing the income that the housewife could earn in the market.⁴ A lower-bound estimate of its value

² See *Muller v Oregon*, 208 US 412 (1908).

³ See Elisabeth M. Landes, *The Effect of State Maximum-Hours Laws on the Employment of Women in 1920*, 88 J Pol Econ 476 (1980).

⁴ One estimate is that a full-time housewife contributes, on average, 40 percent of the full (that is, pecuniary plus nonpecuniary) income of the household. Calculated from Reuben Gronau, *Home Production—A Forgotten Industry*, 62 Rev Econ & Stat 408 (1980). But the reader should be warned of the variety of estimates of housewives' imputed earnings, and of the lurking methodological problems. See, for example, Ann Chadeau, *Measuring Household Activities: Some International Comparisons*, 31 Rev Income & Wealth 237 (1985); Marianne A. Ferber and Carole A. Greene, *Housework vs. Marketwork: Some Evidence How the Decision is Made*, 29 Rev Income & Wealth 147 (1983); Martin Murphy, *The Value of Nonmarket Household Production: Opportunity Cost Versus Market Cost Estimates*, 24 Rev Income & Wealth 243 (1978).

is, indeed, the amount housewives would earn in a world without income taxes if they entered the market. (It is a lower bound because a given woman might be more productive in the household than in the market.) Because the housewife's "earnings" in the home are not taxed, however, women will stay at home even when they would be worth more in the market. For example, suppose the value of a housewife's work is \$40,000 a year; her earnings in the market (net of all expenses associated with market work—commuting costs, etc.) would be \$50,000; and she would be in the 28 percent income tax bracket if she did enter the market. Then her after-tax income would be lower in the market than at home, and she will stay home even though she is worth more in the market.⁵

Although this distortion could be eliminated or at least reduced by taxing housewives' imputed earnings, the measurement problems would be formidable, to say the least. Otherwise there would be no economic explanation for failing to tax all significant nonpecuniary goods, notably leisure. Even if there were no formidable problems of measurement, however, a tax on nonpecuniary income would be greatly resented because few taxpayers would understand its rationale. It would seem like a tax on motherhood—and would seem so precisely because other forms of nonpecuniary income are not taxed. There is also a potential liquidity problem in requiring that tax be paid on nonpecuniary income (more on this later).

An alternative to taxing housewives' imputed earnings would be exempting working wives' income from income tax up to an amount equal to some estimate of the average value of the earnings from housework. But there would still be a problem of measurement. And the exemption would operate as a subsidy to marriage and thereby distort the choice of women whether (or when) to marry. The most feasible approach might be to allow an income-tax deduction for the costs of household help, on the ground—which is entirely realistic—that these costs actually are business expenses. Notice, however, that this approach might have distributive effects somewhat similar to those of a housewives' tax, because by lowering the tax revenues collected from working women the deduction would require an increase in the income tax rate, causing in turn an increase (with no offsetting deduction) in the tax burden borne by households with a housewife.

Whatever the solution, the distortion caused by the failure to

⁵ I ignore the complications arising from the fact that many women who work full time also do considerable housework.

tax housewives' real (though nonpecuniary) earnings is an important question for research. Why then is it not a question in which feminists are interested? Perhaps because economic analysis is thought to cut against women's interests. Or perhaps because the proposal of a tax on housewives' imputed earnings is thought to imply increasing the tax burden on women—indeed to invite comparison to a proposal to tax slaves on the ground that they produce real though nonpecuniary income. The comparison is superficial. To isolate the effect of a tax reform designed to reduce the misallocative effects of the existing system of taxation, the analyst must assume that the overall tax burden is not to be increased; that any new tax will be offset by a reduction in an existing tax. (I employed this assumption in discussing the distributive effect of an income-tax deduction for the cost of household help.) Suppose a housewives' tax would be offset by a reduction in the federal income tax rate. Then taxes paid by working women and their husbands would fall; so would taxes paid by the husbands of housewives. The effect on husbands' income is relevant even if we do not care anything about men's welfare. Because much consumption within the household is joint, each spouse benefits from the income earned by the other, and an increase in husbands' income will therefore benefit wives as well. For both reasons (the fall in the taxes paid by working women and the fall in the taxes paid by working husbands), there is no ground for supposing that a tax on housewives' imputed income would increase the tax burden borne by women. It would, however, eliminate tax incentives from the decision whether to work within or outside the home. In doing so it would have the incidental but relevant effect of making men more comfortable with the idea of their wives' working outside the home. But the most important point is that the economic or libertarian perspective (these are not identical, of course, but they are connected) shows that things are not always as they seem; legislation superficially inimical to women's interests may actually serve those interests—and vice versa as we shall see. Feminists who are not libertarians may not like the vocabulary, methods, and assumptions of economics, but if they refuse to consider the economic consequences of policies affecting women they may end up hurting rather than helping women.

The concept of housewives' imputed earnings has implications that go beyond taxation. One concerns the assessment of damages in tort cases and turns out to be a clearly "pro-woman" implication or corollary of the idea of a housewives' tax. If a housewife is disabled, how should her lost "earnings" be evaluated? My analysis of

a housewives' tax implies that a *minimum* estimate of a disabled housewife's lost earnings is the wage she would have commanded in the market (summed over the estimated period of disability and then discounted to present value at the appropriate interest rate), for if those earnings were less, she would switch from household to market employment. This method of estimation would probably yield higher estimates than the "replacement cost" method, which is the one most courts use at present and is flawed by the tendency to ignore the quality dimension of the housewife's services.⁶ I add that the analysis of housework applies to work done by men as well as by housewives; but most housework, when housework is defined to include child care, is done by housewives.

Where the libertarian is apt to part company with the liberal or radical feminist in the field of employment is over the question whether employers should be forced to subsidize female employees, as by being compelled to offer maternity leave or pregnancy benefits, or to disregard women's greater longevity than men when fixing pension benefits.⁷ To the extent that women workers incur higher medical expenses than men (mainly but not entirely due to pregnancy), or live longer in retirement on a company pension, they cost the employer more than male workers do. So the employer should not be required to pay the same wage *and* provide the same package of fringe benefits. (Of course, to the extent that women impose lower costs—for example, women appear to be more careful about safety than men, and therefore less likely to be injured on the job—they are entitled to a correspondingly higher wage or more extensive fringe benefits.) This is not to suggest—which would be absurd—that women are blameworthy for getting pregnant or for living longer than men. It is to suggest merely that they may be more costly workers and that, if so, the disparity in cost should be reflected in their net compensation.⁸ If

⁶ For discussions of the various methods see Comment, *Tort Damages for the Injured Homemaker: Opportunity Cost or Replacement Cost?*, 50 U Colo L Rev 59 (1978); Robert P. Wolf, *Assessing the Value of Householder Services: Three Methods*, 22 Trial 81 (Oct 1986).

⁷ To a significant extent, the law now requires such subsidies. See Pregnancy Discrimination Act of 1978, 42 USC § 2000e(k) (1978); *Los Angeles Dept. of Water & Power v Manhart*, 435 US 702 (1978); *Arizona Governing Committee v Norris*, 463 US 1073 (1983). On the possible social costs see Samuel A. Rea, Jr., *The Market Response to the Elimination of Sex-Based Annuities*, 54 Social Econ J 55 (1987).

⁸ Women may, of course, be better as well as more costly workers; then their net compensation might be as high as or higher than men's. Presumably, though, the fringe-benefit package would be different. The additional pension costs of women under a "unisex" system are, by the way, substantial, as shown in Robert L. Moore, *Are Male/Female Earnings Dif-*

this disparity is not reflected, then male workers are being discriminated against in the same sense in which women would be discriminated against if they received a lower wage than equally productive (and no less costly) male workers. What is sauce for the goose should be sauce for the gander. More than symmetry is involved; we shall see in a moment that laws designed to improve the welfare of women may boomerang, partly though not wholly because of the economic interdependence of men and women.

I anticipate three objections to my analysis. The first is that in speaking of employers subsidizing women I am taking as an arbitrary benchmark the costs and performance of male workers. I am not. Consider an employer who is female in a hypothetical female-dominated society and whose entire labor force is also female, so that for her the benchmark in setting terms of employment is female. A man applies for a job. He asks for a higher wage on the ground that experience shows that the average male employee's medical costs are lower than the average female employee's medical costs. If the employer refuses to pay him the higher wage, then, assuming that this worker is just as good as the employer's average female worker, the employer is discriminating against him. This should answer the second objection—that nature should not be allowed to determine social outcomes. I agree that natural law does not compel the conclusion that women should be penalized in the marketplace or anywhere else for living longer or for incurring greater medical costs on average than men. But neither is there any reason why men should be penalized for not living as long as women by being forced to pay for women's longer years of retirement. The matter should be left to the market.

The third objection to my analysis is that, in suggesting that the employer be allowed to make cost-justified differentiations based on sex, I am necessarily implying that he should be permitted to treat employees as members of groups whose average characteristics the particular employee may not share, rather than as individuals. That is true. Some women die before some men, just as some women are taller than some men. The difference is that while it is obvious on inspection whether a given woman is taller than a given man—and therefore it would be absurd for an em-

ferentials Related to Life-Expectancy-Caused Pension Cost Differences?, 25 *Econ Inquiry* 389 (1987). I ignore the complication that would be introduced if it were assumed that there was a national policy of promoting childbirth. The question would then be whether requiring employers to subsidize pregnant employees was an appropriate (efficient, equitable) method of subsidization.

ployer to implement a (let us assume valid) minimum-height requirement of 5 feet 8 inches by refusing to accept job applications from women, it is not obvious which women employees will not live as long as which men employees or will not take as much leave or incur as high medical expenses. Any cost-based differentiation in these areas must be based on probabilistic considerations, of which sex may be the most powerful in the sense of having the greatest predictive power. The average differences between men and women are not invidious, and many cut in favor of women—they are safer drivers, and they live longer, and in a free insurance market would therefore be able to buy liability insurance and life insurance at lower rates than men. Women would not be stigmatized if the market were allowed to register these differences.

It is not even clear, moreover, that women benefit, on balance, from laws that forbid employers to take into account the extra costs that female employees can impose. Such laws discourage employers from hiring, promoting, and retaining women, and there are many ways in which they can discriminate in these respects without committing detectable violations of the employment-discrimination laws.⁹ Sometimes there is no question of violation, as when an employer accelerates the substitution of computers for secretaries in response to an increase in the costs of his female employees.

There is an additional point. Most women are married—and many who are not currently married are divorced or widowed and continue to derive a benefit from their husband's earnings. The consumption of a married woman is, as I have noted, a function of her husband's income as well as of her own (in the divorce and widowhood cases as well, for the reason just noted). Therefore a reduction in men's incomes as a result of laws that interfere with profit-maximizing and cost-minimizing decisions by employers will

⁹ Suits for employment discrimination are not a terribly effective remedy. They are rarely worth bringing even when the prospects for winning are good, because, in general, the successful plaintiff can obtain only back pay and reinstatement, not common law damages, and because the filing of an employment discrimination suit identifies the plaintiff as a "trouble-maker," thereby making him or her unattractive to future employers. (Many women, I have been told, regard filing a sex-discrimination suit as tantamount to committing professional suicide.) In addition, most discrimination cases are difficult to win, because the plaintiff, unless irrationally willing to invest resources in investigation and proof that are disproportionate to the modest stakes in most such cases, will be hard-pressed to establish the counterfactual proposition essential to victory: for example, that she would not have been fired if she had been male. I am speaking here primarily of disparate-treatment (intentional discrimination) rather than disparate-impact litigation, but the latter will not eliminate most forms of sex discrimination.

reduce women's welfare as well as men's. Moreover, women who are not married are less likely to have children than women who are married; and where employer benefits are child-related—such as pregnancy benefits and maternity leave—their effect is not merely to transfer wealth from men to women but from women to women. The effect could be dramatic. Compare the situation of a married woman with many children and an unmarried woman with no children. Generous pregnancy benefits and a generous policy on maternity leave will raise the economic welfare of the married woman. Her and her husband's wages will be lower, because all wages will fall in order to finance the benefit, but the reduction will probably be smaller than the benefits to her—in part because the unmarried female worker will experience the same reduction in wages but with no offsetting benefit. Feminists who support rules requiring employers to grant pregnancy benefits and maternity leave may therefore, and I assume unknowingly, be discouraging women from remaining single or childless. Feminists of all persuasions would think it outrageous if the government required fertile women to have children, yet many feminists support an oblique form of such a policy—a subsidy to motherhood. They do this, I suspect, because they have not considered the economic consequences of proposals that *appear* to help women.

The principle of equal pay for equal work makes perfectly good economic sense,¹⁰ provided that equal work is understood,

¹⁰ This is not to say that a law *requiring* such equality on the part of private employers (an important qualification, as will shortly become apparent) makes perfectly good economic sense. Such laws are costly to administer, can backfire, and are of dubious efficacy. It might make more sense to allow market forces, which penalize irrational discrimination (see Gary S. Becker, *The Economics of Discrimination* ch 2 (The University of Chicago Press, 2d ed 1971); Richard A. Posner, *Economic Analysis of Law* ch 27 (Little, Brown and Co, 3d ed 1986)), to take care of irrational discrimination against women in employment, such as discrimination based on an erroneous assessment of the costs and qualities of women as workers or on a refusal (perhaps motivated by hostility to women) to act on a correct assessment. I am not such a Pollyanna as to think that market forces will eliminate all discrimination against women, but if they eliminate most of it, eliminating the rest may not be worth the cost of the legal remedies.

A difficult case is sexual harassment in the workplace. Although market forces militate against such harassment, they may not be completely effective (for reasons I discuss in my book *Law and Literature: A Misunderstood Relation* 190-91 (Harvard University Press, 1988)); this is suggested by the fact that such harassment is found even in firms operating in highly competitive markets. Yet it is not "efficient," merely because it has survival qualities. It is a market abuse, like embezzlement or commercial bribery—or, for that matter, rape, which sexual harassment resembles. So a law against sexual harassment, as Title VII of the Civil Rights Act of 1964, 42 USC § 2000e (1964), has been interpreted to be, is consistent with libertarian principles—more so, oddly enough, than the basic prohibition against discrimination in hiring, firing, promotion and wages. Discrimination may in some cases serve

consistently with the previous discussion, to mean equal in cost to the employer as well as in benefit to the employer (productivity). It does not follow, however, that women are bound to have the same average wage rate as men even if there is no difference in medical or other costs or those differences are offset by other factors. Whether, despite being just as "good" as men, women will have the same average wage rate depends critically on whether they are willing to make the same commitment to the labor force as men do. A woman who takes several years out of the work force to stay home with her young children cannot expect to have the same average wage as a man who works continuously.¹¹ Since her expected working life is shorter, she will invest less in her human capital (earning capacity); and part of a wage is a return to that investment.¹²

Feminists who are not libertarians may retort that the propensity of women rather than men to take leave from work to raise their children is itself a subtle consequence of sex discrimination, "sex role socialization," or related factors.¹³ Whether it is nature or culture that is responsible for the fact that on average male self-esteem is more involved in career than female self-esteem is a profoundly difficult question on which I can claim no expertise; but certainly it would be rash to reject nature out of hand. It is possible that women are more devoted to children than men are and

the employer's interests and even be socially efficient. See Posner, *Economic Analysis of Law* at 624; Edmund S. Phelps, *The Statistical Theory of Racism and Sexism*, 62 Am Econ Rev 659 (1972). Sexual harassment is much less likely to have any redeeming social value. See Posner, *Law and Literature* at 190-91.

¹¹ If, however, women's greater longevity results in their retiring later than men, their total working life may be the same as, or even longer than, that of men.

¹² See Gary S. Becker, *Human Capital, Effort, and the Sexual Division of Labor*, 3 J Labor Econ S33, S52-S54 (1985). And indeed much of the difference in average hourly wages between men and women appears to reflect differences in investment in human capital. See Jacob Mincer and Haim Ofek, *Interrupted Work Careers: Depreciation and Restoration of Human Capital*, 17 J Human Resources 3 (1982); Jacob Mincer and Solomon Polachek, *Family Investments in Human Capital: Earnings of Women*, 82 J Pol Econ S76 (1974); Mary Corcoran and Greg J. Duncan, *Work History, Labor Force Attachment, and Earnings Differences Between the Races and Sexes*, 14 J Human Resources 3 (1979). But how much? Estimates range from 39 to 45 percent. See Francine D. Blau and Marianne A. Ferber, *Occupations and Earnings of Women Workers*, in Karen Shallcross Koziara, Michael H. Moskow, and Lucretia Dewey Tanner, eds, *Working Women: Past, Present, Future* 37, 57 (BNA, 1987). How much of the unexplained variance is due to discrimination is of course unknown. The variance itself, though large, appears to be declining; the decline has been masked by the very influx of women into the workforce, since new workers tend to receive low wages. See June O'Neill, *The Trend in the Male-Female Wage Gap in the United States*, 3 J Labor Econ S91 (1985).

¹³ See, for example, Mary E. Corcoran and Paul N. Courant, *Sex Role Socialization and Labor Market Outcomes*, 75 Am Econ Rev Papers & Proc 275 (May 1985).

more talented at child rearing and that these differences reflect a genuine comparative advantage possessed by women as a result of millions of years of evolution, rather than just "brainwashing" by men and male-dominated women.¹⁴ The human infant requires prolonged nurture, and there may well have been efficiency advantages, under the exceedingly primitive conditions that obtained throughout all but the most recent history of the human race, to a sexual division of labor in which one spouse specializes in nurture and the other in hunting and in protection from enemies. To an unknown extent, that division may be "hard-wired" into our brains.

Even if these speculations are correct, they are correct about the average woman versus the average man rather than about every woman and every man. Within each there is a distribution of attitudes toward children. And the two distributions intersect. Many women are less devoted to children and less skillful at raising children than many men. The point of intersection is undoubtedly influenced by cultural factors that are changeable, as well as by biological factors that may be changeable if at all only at great cost. But whether biological or cultural factors predominate in the observed differences between the job commitments of men and women may be peripheral to the questions of policy that are involved in the debate over the male-female earnings gap. It is a mistake to suppose that biological differences are always more refractory than cultural ones. Genetic vision defects can be corrected by glasses more easily than social customs can be changed by government. But the point cuts in both directions. The fact—if it is a fact—that the predominant role of women in child-rearing is culturally contingent rather than biologically determined does not imply that it can easily be changed by governmental intervention or that we should greet governmental regulation of the family structure with open arms. The idea that government should try to alter the decisions of married couples on how to allocate time to raising children is a strange mixture of the Utopian and the repulsive. The division of labor within marriage is something to be sorted out privately rather than made a subject of public intervention. Liberal and radical feminists can if they want urge women to stay in the labor force and have no children or fewer children, or persuade their husbands to assume a greater role in child rearing. Others can

¹⁴ See, for example, David P. Barash, *Sociobiology and Behavior* ch 6-7 (Elsevier, 1977). For a contrary view, see W. Penn Handwerker and Paul V. Crosbie, *Sex and Dominance*, 84 *Am Anthropologist* 97 (1982).

urge the contrary. The ultimate decision is best left to private choice. (Parallel arguments can be made—and often are made by feminists—against laws that forbid abortion or that subsidize marriage and childbearing.)

This analysis argues against publicly financed day-care centers for children of working women (other than those who are very poor), beyond the obvious libertarian argument that if the families of working mothers are willing and able to pay for day care, the market will provide the service more efficiently than the government—and if they are not willing, on what ground should taxpayers be forced to pay for this service? A comprehensive public system of day-care centers, on the Swedish model, would require a substantial increase in taxation.¹⁵ This increase would significantly, perhaps dramatically, reduce the disposable income of all households, but the crunch would be particularly severe in households with a nonworking wife.¹⁶ Although, as I have said, the work that housewives do is valuable, it is not pecuniary, and a household could encounter liquidity problems if one wage earner's income had to bear the full brunt of taxation. So the day-care program would drive women out of the home.¹⁷ Besides the liquidity effect, a taxpayer-supported day-care program would distort the woman's choice between home and market by driving a wedge between the social cost of day care and the private cost (zero, if the subsidy paid the household's full cost of day care). Again we find feminists supporting a form of public intervention that would interfere with free choices by women. Admittedly, the distortion just noted might offset the distortion noted earlier that is created by the failure to tax housewives' real but nonpecuniary income from household production. And the taxing of housewives' income, a project with plau-

¹⁵ The American and Swedish systems of day care are compared in William M. Bridge-land, Philip R. Smith and Edward A. Duane, *Child-Care Policy Arenas: A Comparison Between Sweden and the United States*, 26 *Intl J Sociology* 35, 36-37 (1985). It has been estimated that in the United States by 1995 two-thirds of preschool children and three-fourths of school-age children will have working mothers. Sandra L. Hofferth and Deborah A. Phillips, *Child Care in the United States, 1970 to 1995*, 49 *J Marriage & Family* 559, 561 (1987). For a skeptical view of the existence of a day-care "crisis" in the United States, see Ron Haskins, *What Day Care Crisis?*, Regulation 13 (1988).

¹⁶ Why, by the way, should childless persons be taxed to pay for day care? Does day care provide the external benefits that public education provides and that are widely believed to justify on strictly economic grounds some level, at least, of public subsidy for education? Perhaps so. One possible argument is that day care is likely to be better for a child than a low-quality mother and that low-quality mothers are more likely to use day care than high-quality ones. If so, a public subsidy for day care might confer a net external benefit on children. Plainly this is another important area for research.

¹⁷ See Michael Levin, *Feminism, Stage Three*, 82 *Commentary* 27 (Aug 1986).

sible economic support, would create the same liquidity problem as taxation designed to support universal day care.

Another ambitious feminist proposal that is economically questionable is "comparable worth,"¹⁸ at least when extended from government employment (which may well embody departures from competitive wage-setting that are due to sex discrimination since government is subject to, at best, weak competitive constraints) to the private sector. The idea behind comparable worth is that occupations traditionally dominated by women, such as nursing, are underpaid relative to occupations traditionally dominated by men, such as driving a truck. The problem is that while it is relatively easy to determine when men and women are being paid differently for the same work—at least where they are performing standardized chores in which productivity varies little among workers—it is next to impossible to determine when the wage differential among occupations is greater than is necessary to compensate for differences in skills, working conditions, etc. The best evidence is a queue of workers seeking entry into higher-paid occupation and a shortage of workers in the lower-paid occupation. But the very nature of this evidence is also a clue to the self-correcting character of "comparable worth" problems. If one occupation is overpaid relative to another, workers will flow from the second to the first, causing wages to rise in the second and fall in the first until comparable worth is restored. Comparable worth is the equilibrium, and disequilibrium is self-correcting provided there are not artificial barriers to entry. (This is a clue to why the argument for comparable worth is stronger when applied to public employment.) If women are not excluded from higher-paid occupations or (what is the same thing) confined to lower-paid occupations, a difference that exceeds the equilibrium pay difference between occupations that will draw them into the higher-paid occupation and comparable worth will be achieved automatically, without any need for public intervention beyond, perhaps, prohibitions against the exclusion of women from occupations—and that is already prohibited by Title VII.

All this may be too sunny and certainly is in tension with the evidence that at least *some* of the male-female earnings gap is due

¹⁸ For discussion and references see Posner, *Economic Analysis of Law* at 314 (cited in note 10); Daniel R. Fischel and Edward P. Lazear, *Comparable Worth and Discrimination in Labor Markets*, 53 U Chi L Rev 891 (1986); Paul Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 Harv L Rev 1728 (1986).

to discrimination,¹⁹ although, as I said earlier, the gap is narrowing. It might be better to attack the remaining discrimination directly, difficult though that is, rather than settle for a "separate but equal" solution, as comparable worth has been described.²⁰ The costs of achieving comparable worth in the private sector could be considerable, since it will reduce the efficiency with which labor is utilized; private employers, even those not entirely free from discriminatory tendencies, will make more efficient employment decisions than, for example, the bureaucrats in the Department of Labor. And comparable worth may not succeed in redistributing wealth in favor of women. Its effect is to attract into the "women's" fields both men who formerly worked in the "men's" fields and the (few) women who worked there, resulting in more workers—many of them men—bidding for fewer jobs (since employers will respond to a rise in the cost of labor by hiring fewer workers). Women displaced from the now better paid "women's" fields will compete with women in fields not covered by comparable worth, resulting in lower wages for the women in those fields.²¹ And to the extent that men are hurt, the women married to those men are hurt too, since, as noted earlier, to the extent that consumption in the household is joint, each spouse benefits from the other's income.

II. THE FAMILY AND SEX

The questions become even more difficult when we switch focus from employment to the family and sex, where such issues as abortion, surrogate motherhood, rape (including "date rape" and marital rape), incest, battered wives, divorce, and pornography fill the horizon. The libertarian perspective provides a unified, though in some places a highly controversial and in other places an indeterminate, approach to these issues. From that perspective the fo-

¹⁹ See note 12. And see William T. Bielby and James N. Baron, *Sex Segregation Within Occupations*, 76 Am Econ Rev Papers & Proc 43 (May 1986), for evidence that some employers do steer men and women into different job classifications.

²⁰ See Daphne Greenwood, *The Institutional Inadequacy of the Market in Determining Comparable Worth: Implications for Value Theory*, 18 J Econ Issues 457, 463 (1984).

²¹ See Robert S. Smith, *Comparable Worth: Limited Coverage and the Exacerbation of Inequality*, 41 Industrial & Labor Rel Rev 227 (1988). Within the public sector, where wages often are not determined in accordance with competitive forces in labor markets, comparable worth may be a sounder policy. For some evidence see Elaine Sorensen, *Implementing Comparable Worth: A Survey of Recent Job Evaluation Studies*, 76 Am Econ Rev Papers & Proc 364 (May 1986).

cus is, once again, on freedom of contract.²² People should be able to cut their own deals, in matters of sex and the family as well as in more conventionally economic arenas, subject to a duty not to impose uncompensated costs on third parties.²³ When transaction costs are high, the law should try to impose the deal that the parties would have struck if negotiation had been feasible.

This approach works well with such issues as divorce and surrogate motherhood, less well with rape, incest, and pornography, and poorly with abortion. When marriage is viewed as a contract, divorce becomes the name for contract termination, and the question becomes one of the proper remedy.²⁴ The closest analogy to marriage in the sphere of contracts is partnership, and the rule in partnership law is that upon dissolution each partner takes back the assets that he had contributed to the partnership. Until recently, the law had failed to value the wife's contributions adequately. For example, in the common case when the wife had put her husband through medical school or law school, the courts failed to recognize that she was part owner of the degree her husband had obtained and of the earning power conferred by that degree, and thus tended to award less alimony (which in this analysis is installment "repatriation" of the wife's share of the nonliquid assets of the marriage) than was economically efficient. This ineq-

²² And here it is timely to remember that until this century the limitations on the contractual rights of married women, and on the right of divorce, were so substantial that it was possible for a sober observer to state: "The law of the status of women is the last vestige of slavery." Nicholas St. John Green, *Married Women*, in his *Essays and Notes on the Law of Tort and Crime* 31, 48 (George Banta, 1933) (first published in 1871). Yet as is now widely recognized, "no fault" divorce is not the answer. More men than women desire divorces. Therefore, allowing either spouse to divorce at will deprives married women of substantial bargaining power: Since their consent to granting their husband a divorce is no longer required, they can't condition that consent on the husband's agreeing to pay reasonable alimony and child support. "The major economic result of the divorce law revolution is the systematic impoverishment of divorced women and their children." Lenore J. Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* xiv (The Free Press, 1985). This finding is a warning to feminists about the unintended consequences of public policies.

²³ There *could* be external benefits from a higher population (national defense, larger markets permitting more effective exploitation of economies of scale, to name a few), and these *might* justify subsidies for childbirth. I ignore this possibility; it seems remote from the present condition of the United States, with its huge population, its serious problems of congestion and pollution, and its heavy immigration both legal and illegal.

²⁴ On the economics of marriage and divorce see, for example, Gary S. Becker, *A Treatise on the Family* (Harvard University Press, 1981); Elisabeth M. Landes, *Economics of Alimony*, 7 J Legal Stud 35 (1978); Lloyd Cohen, *Marriage, Divorce, and Quasi Rents*; or, "I Gave Him the Best Years of My Life", 16 J Legal Stud 267 (1987); Posner, *Economic Analysis of Law* ch 3 (cited in note 10).

uity is gradually being corrected.²⁵

Surrogate motherhood²⁶ is, from the woman's standpoint, the nine-month rental of her reproductive capacity to another family. Why there is a movement afoot—supported by many though not all feminists²⁷—to forbid women to obtain a monetary return on this valuable, uniquely female asset puzzles me. The movement is paternalistic (pun intended), indeed patronizing, because it denies the capacity of the surrogates to make advantageous contracts. It treats women as children, men (the father) as wily, deceitful, and manipulative; it reinforces the stereotype of women as being dominated by emotion rather than reason; and it reminds us of the time when married women were not legally competent to make contracts. The surrogates (even those—who are, I believe, the majority—who have borne children before) are not credited with sufficient foresight or emotional maturity to charge a price that will compensate them not only for the risk and expense of the pregnancy but for the emotional wrench experienced at giving up the newborn baby. There are, of course, women who lack the requisite foresight and emotional maturity, just as there are men who lack the requisite foresight and emotional maturity to make rational decisions to engage in such characteristically male voluntary activities as high-stakes gambling, illegal trafficking in drugs, military combat, and dangerous sports. The saga of "Baby M"²⁸ has distorted public and professional thinking on surrogate motherhood. One is not surprised that some surrogate mothers experience deep regret when it comes time to surrender the newly born baby; but a sensible decision on whether to forbid contracts of surrogate motherhood—that is, whether to deem adult women incompetent to enter into binding contracts of a particular type—requires consideration not only of these women but also of the surrogates who complete the performance of their contractual undertaking without incident, of the father and adoptive mother, and of the children. As far as I am able to discover,²⁹ the vast majority of surrogates are

²⁵ See, for example, *O'Brien v O' Brien*, 66 NY2d 576, 489 NE2d 712 (1985) (treating husband's medical license as marital property); Allen M. Parkman, *The Recognition of Human Capital as Property in Divorce Settlements*, 40 Ark L Rev 439 (1987).

²⁶ I find "surrogate motherhood" a rather misleading name for the rental of a woman's reproductive capacity.

²⁷ For a feminist defense of surrogate motherhood, see Lori B. Andrews, *Surrogate Motherhood: The Challenge for Feminists*, 16 Law, Medicine & Health Care 72 (1988).

²⁸ See *Matter of Baby M*, 109 NJ 396, 537 A2d 1227 (1988).

²⁹ See my article, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 J Contemp Health L & Policy 21, 25 (1989).

satisfied with the arrangement, as are, of course, the fathers and the adoptive mothers. It is too soon to tell whether surrogate motherhood will harm the children, but the likelihood seems small. The only practical difference between surrogate motherhood and adoption is that the price is somewhat higher under the former arrangement—\$10,000 on average versus about \$3,000 (some adoption agencies, however, charge as much as \$15,000)—although the comparison is somewhat academic since very few healthy white infants are available from adoption agencies any more, and, whether rightly or wrongly, those are the children that most people want to adopt. How the price difference might cause psychological injury to the surrogate children is beyond me.

I might react differently if persuaded that many surrogate mothers are desperate women, driven by extreme poverty to engage in a form of sale that causes them deep emotional distress. I might say in such a case that society should do something to relieve their poverty and desperation beyond merely permitting them to sell their only marketable asset. But I have not seen the evidence that would persuade me of this—and I have been looking for it.

It might seem that from the surrogate mother's standpoint, the best of all possible worlds would be a rule that permitted her to take money in exchange for agreeing to bear a child for another couple but entitled her to change her mind, when the baby was born, about giving it up. But the price she would receive for the rental of her reproductive capacity would be lower under such a regime. The couple would be getting considerably less for their money, since if the surrogate mother decided to keep the child they would have lost many months in their quest for a child. A final consideration is that if contracts of surrogate motherhood are forbidden, married men who are desperately eager for a child may decide to abandon their wives.

Rape and pornography present easier issues in principle than in practice. Rape parallels theft in being a coerced taking in a setting of low transaction costs. Persons who want sex (violent or otherwise) should be required to "bargain" for it. This is not to say that sex is characteristically commercial or that legalizing prostitution is the answer to the problem of rape. It is to say that personal relationships, like commercial ones, can be presumed to be welfare-enhancing only when they are consensual, involving commitments (implicit or explicit) of mutual pleasure, emotional support, marriage, children, etc. Just as someone who covets my compact-disc player should be required to bargain for it with me rather than

allowed to purloin it, so men should not be permitted to impose themselves on unwilling women. The difficult problem in rape, as in incest, child abuse, and wife-battering, is that criminal activity which occurs in private, and which may leave few or no physical traces, poses difficult evidentiary problems for courts.

Pornography parallels pollution in being the result of a voluntary activity (the sale of pornography to the consumers of pornography, the sale of the factory's product to the consumers of that product) that may have uncompensated third-party effects, such as inciting its consumers to rape. The rape and pornography examples are convergent for those who believe that pornography encourages its consumers to commit rape by teaching that women enjoy forcible subordination to men.

The practical problems arise from the evidentiary difficulties that I have just alluded to that complicate rape cases (mainly but not limited to difficulties connected with the defense of consent), uncertainty about the existence or magnitude of the effects of pornography on third parties (pornography may have little or no effect on the incidence of sex crimes—may be, indeed, at least for some consumers of pornography, a substitute for rape), and difficulty in distinguishing pornography from socially valuable forms of expression concerning sex. About these problems I have nothing new to say,³⁰ but I do want to comment on the suggestion that using misrepresentation to obtain consent to sexual intercourse should be declared a form of rape, though perhaps punished less seriously than forcible rape.³¹ The evidentiary problems would be serious, but I am interested in another point: the implicit modeling of sexual relations on the economic market. Obtaining money by fraud or false pretenses is a crime; thus, the suggestion goes, obtaining sex by fraud or false pretenses should also be a crime. Many feminists are hostile to capitalism in general and to prostitution in particular. They may not realize that to imply that the criminal law of fraud provides an appropriate model for the law of rape is to embrace the economic model of social interaction in a particularly uncompromising form.

I now turn to an issue about which the libertarian has, I believe, nothing to say except that the issue resists fruitful analysis in libertarian or economic analysis. That is the issue of abortion. At first glance there might appear to be a simple libertarian solu-

³⁰ I discuss the feminist challenge to pornography briefly in Posner, *Law and Literature* at 334-37 (cited in note 10).

³¹ See Susan Estrich, *Real Rape* 103 (Harvard University Press, 1987).

tion: The mother should be entitled to abort the fetus at any stage of pregnancy and for whatever reason, provided she is willing to pay the cost of the abortion. The only condition would be that she must get the father's permission if, but only if, the implicit or explicit contract between her and the father made the fetus a joint "asset" of its parents rather than the mother's asset only. Assuming either that the father does consent or that he is not required to consent because he has no contractual interest in the fetus, abortion would appear to be a voluntary transaction with no third-party effects. But this analysis ignores the effect on the fetus itself. *If* the fetus is deemed a member of society, with the consequence that its welfare counts in the social calculus along with that of the mother and father, then it is not obvious that abortion is value-maximizing on the average, unless perhaps the fetus has some terrible deformity that might permit us to say with some confidence that if it could be consulted in the matter it would say that it would rather not be born—in other words, unless the fetus would incur a net disutility, both expected and realized, from living. Of course, even a healthy fetus might "prefer" to be born to more mature parents (abortion when used as a device for family planning affects the timing but not necessarily the number of children that a woman has); but it would be a different fetus that would be born later.

The decision whom to count as a member of society (foreigners? animals?) for purposes of determining whether his or her or its welfare shall count in the design of social institutions is a moral question about which libertarians (in the sense in which I am using the word) and economists have nothing to say. Nor is the status of the fetus the only moral issue; so is the freedom of the woman who finds herself involuntarily or accidentally pregnant. The libertarian can point out that regardless of how the moral issues are resolved, laws forbidding abortion are unlikely to be any more effective than other laws penalizing victimless crimes (the fetus is not an articulate victim and its family can't be counted on to bring its "killers" to justice).³² And abortion laws are undoubtedly a severe curtailment of women's liberty, and one having no counterpart in laws affecting men. But as the moral issue both depends critically on the status to be assigned the fetus and is central to the controversy over abortion, economic or libertarian analysis will not resolve the

³² For an attempt to estimate the effect of prohibiting abortion on the incidence of abortions, see Marshall H. Medoff, *An Economic Analysis of the Demand for Abortions*, 26 *Econ Inquiry* 353 (1988).

controversy.

III. DO WOMEN AND MEN THINK DIFFERENTLY ABOUT LAW?

The discerning reader will have noticed in the discussion up to now three stages of feminist thought. In the first, which corresponds to the first stage in the civil rights movement, women seek simply to be relieved from legal disabilities that limit their range of choice compared to that of men. (Abortion is a complicated instance of the simple point.) In the second stage, which corresponds to the second, "affirmative action" stage in the civil rights movement—the stage this movement is now in—women seek affirmative benefits in order to remove a residue of past discrimination. Comparable worth is best understood in this light. In both stages it is assumed that women are identical to men in every respect to which public policy might be relevant. In the third stage, which has no counterpart in the civil rights movement, women are admitted to be different (on average) from men in certain policy-relevant respects such as longevity and pregnancy but it is argued that these differences should not be allowed to influence employers; nature should not dictate, or even justify, social outcomes. Desexed annuity tables, subsidized day care, and compulsory disability benefits for pregnancy are all products of this third stage.³³ But while conceding physical differences between men and women, third-stage feminists do not argue (and indeed would be inclined to deny) that women *think* differently from men. Such an argument would undermine their position. It is one thing to say that differences between the male and female reproductive systems, or differences in physical strength or longevity, or the different roles of men and women in nurturing infants—all differences that we share with other primates—should not affect marketplace compensation, and quite another to say that women and men should receive the same compensation even if there are profound and permanent mental and psychological differences between the sexes. Yet fourth-stage feminists, heavily represented in contemporary feminist jurisprudence, appear to claim precisely this.³⁴

³³ Subsidized day care is actually an ambiguous case, for it is sometimes justified on the ground that, but for the legacy of discrimination against women, men would play a greater role in child-rearing than they do, thus freeing women to work outside the home without having to buy day care.

³⁴ For illustrations, see Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J Legal Educ 3 (1988); Marjorie E. Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement*, 86 Mich L Rev 465 (1987); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 Va L Rev 543 (1986); Robin West,

I first became aware of this claim two years ago, while teaching a course on Law and Literature. I had noticed that in a number of works of literature, including *Antigone*, Euripides' *Hecuba*, *The Merchant of Venice*, *Measure for Measure*, and Susan Glaspell's *A Jury of Her Peers*, a woman is seen appealing to natural law against a male embodiment of legal positivism.³⁵ These works could be read to imply that there is a distinctively masculine outlook on law, an outlook that revels in legalisms, technicalities, rules, strict construction, "hard cases"³⁶—a formalistic outlook, one might call it—and an equally distinctive feminine outlook that emphasizes equity, broad standards, substantial justice, discretion. The masculine outlook abstracts from the rich particulars of a dispute a few salient facts and makes them dispositive; that is law as rules. The feminine outlook prefers to base judgment on the total circumstances of the case, unhampered by rules that require a blinkered vision, untroubled by the need to conform decision to general, "neutral" principles.

I asked the students in my class whether they thought there was any validity to such "gendering" of these opposed visions of law. I expected the women in the class to deny that there was. One of the oldest stereotypes about the sexes is that men are good at abstract thought (and hence good at logic, mathematics, and physics) and at containing or repressing their emotions, while women are good at concrete thought and are intuitive and emotional (and hence good at writing novels); and that women but not men shrink from making hard decisions—that is, decisions that hurt yet may nonetheless be justified and even compelled. To my surprise, two-thirds of the women in the class responded that law as it is taught in law schools (which is to say, with a pronounced "formalist" bias) is more congenial to the male way of thinking than the female. This response illustrates what I am calling the fourth stage of feminist jurisprudence.

This stage owes much to the work of Carol Gilligan, a psychol-

Jurisprudence and Gender, 55 U Chi L Rev 1 (1988).

³⁵ See Posner, *Law and Literature* at 108-13 (cited in note 10); see also Paul Gewirtz, *Aeschylus' Law*, 101 Harv L Rev 1043 (1988). Another illustration, this one from *Billy Budd*, is Captain Vere's telling the court-martial (in the course of his making a highly formalistic argument for the condemnation of Billy) to disregard "the feminine in man." Harrison Hayford and Merton M. Sealts, Jr., eds, *Herman Melville, Billy Budd, Sailor (An Inside Narrative)* 111 (University of Chicago Press, 1962).

³⁶ I use this term in its original sense of cases that tug at the heartstrings, and are therefore thought likely to make "hard law." The implication is that the good judge will resist the pull.

ogist who in an influential book³⁷ distinguished between an "ethic of rights" that she regarded as distinctively masculine and an "ethic of care" that she regarded as distinctively feminine. Her principal evidence for this sex-related difference was the different attitudes of boys and of girls toward "enforcing" the rules of children's games—boys being quick (she found) to "adjudicate" alleged violations and condemn the violator, girls tending to abandon the game when an infraction was charged, for fear that an attempt to determine the rights and wrongs of the parties would result in hurt feelings; boys tending to judge infractions according to hard and fast rules, girls tending to evaluate the alleged infraction in its full human context. Gilligan does not speculate on whether this difference in behaviors (which she finds not only in games, but in the responses of boys and girls to hypothetical moral issues) is due to biology or to upbringing, and if the latter whether it may not be an indirect result of discrimination against women. She does make clear that, whatever its cause, the ethic of care is valuable; it is not something that women should be ashamed of or should regard as a negative legacy of oppression, to be cast off as soon as possible.

The ethic of rights sketched by Gilligan corresponds rather closely to the formalistic style of law, and the ethic of care to the more contextual, personal, and discretionary style. Maybe it's true that women tend to prefer a less formalistic style of law than men. Although in twenty years of teaching law to students of both sexes and seven years of being a judge assisted by law clerks of both sexes I have not noticed any such difference, this may be due to the self-selection of female students who apply to elite law schools, to the socialization that they undergo in law school, or to my own lack of sensitivity. If there is such a difference, we can expect that as women come to play a larger and larger role in the legal profession and the judiciary, the character of our law will change; we will see fewer rules and more standards, less talk about logic and more

³⁷ Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press, 1982). In a similar vein see Mary Field Belenky, et al, *Women's Ways of Knowing: The Development of Self, Voices, and Mind* ch 6 (Basic Books, 1986). Gilligan's findings have been questioned. See William J. Friedman, Amy B. Robinson, and Britt L. Friedman, *Sex Differences in Moral Judgments? A Test of Gilligan's Theory*, 11 *Psych of Women Q* 37 (1987), and references cited therein. Empirical support for Gilligan's theory is presented in Maureen Rose Ford and Carol Rotter Lowery, *Gender Differences in Moral Reasoning: A Comparison of the Use of Justice and Care Orientations*, 50 *J Personality & Soc Psych* 777 (1986); Mary K. Rothbart, Dean Hanley and Marc Albert, *Gender Differences in Moral Reasoning*, 15 *Sex Roles* 645 (1986).

about practical reason, and less anxiety about maintaining law's determinacy, objectivity, and impersonality.

I myself, male though I am, would welcome such a change; for although women may on average be less formalistic than men (I am skeptical that this is so, but it is possible), there are many men who dislike formalism and I am one of them.³⁸ I consider formalism unworkable if not hypocritical; and I think the traditional attempt to link classical liberalism to a rule-bound jurisprudence, an attempt visible in such modern libertarians as James Buchanan and Friedrich Hayek, is doomed to failure. It is true that, if pushed too far, a personalistic, contextualist, in short "realistic" (in the legal-realist sense) conception of law would bring us face to face with the anarchy of "popular justice," symbolized by the trial and condemnation of Socrates by a lay jury of hundreds with no deliberations, no professional judges, and no right of appeal; and by the kangaroo courts of totalitarian regimes, well illustrated by the "people's courts" of Mao's China. But at its formalist extreme law is monstrous, inhuman, socially irrelevant, and thoroughly bogus. Both extremes are to be avoided; to equate the formalist extreme with classical liberalism is a canard on liberalism. Law properly is a mixture of rules and discretion, law and equity, rule and standard, positive laws and ethical principles (corresponding to natural law), logic and practical reason, lay judges and professional judges, objectivity and subjectivity. And the "feminine" pole should be the last thing that any member of an oppressed group—if that is how the modern American woman should be described—wants to see dominate legal thought: As Shylock rightly feared, in arguing for a literal interpretation of his bond with Antonio, discretion in a legal system is apt to be exercised against the pariah.³⁹ It is hard to say whether women would be on balance better or worse off if the legal system were more empathetic than it is, but it does not appear that women fare particularly well under the discretionary system of qadi justice in traditional Moslem law.

In this connection it should be noted that the men who reject formalism are not feminist jurisprudes in any useful sense. They

³⁸ See, for example, Richard A. Posner, *The Federal Courts: Crisis and Reform* (Harvard University Press, 1985); Richard A. Posner, *The Jurisprudence of Skepticism*, 86 Mich L Rev 827 (1988). I am using "formalism" in the rather loose sense of "rule-bound or legalistic"; in its alternative sense of "logical reasoning in cases where such reasoning is possible and pertinent," I of course have no criticism.

³⁹ This point has been made recently by minority legal scholars in criticism of the anti-rights rhetoric of the critical legal studies movement. See Symposium, *Minority Critiques of the Critical Legal Studies Movement*, 22 Harv CR-CL L Rev 297 (1987).

are (in the Anglo-American sphere) legal realists, or pragmatists, or instrumentalists, or skeptics—which is to say that they possess outlooks on law that long predate the entry of women in significant numbers into positions of influence in the legal profession. I question whether there is a distinctively feminine outlook on law, as distinct from an outlook that men and women share, though perhaps in different proportions.

I therefore disagree with Suzanna Sherry's argument that "a feminine jurisprudence, evident, for example, in the decisions of Justice O'Connor, might thus be quite unlike any other contemporary jurisprudence."⁴⁰ What Sherry actually finds in her examination of Justice O'Connor's opinions are a dislike of "bright line" rules and a sensitivity to community interests (this is how Sherry explains the fact that O'Connor is a "law and order" conservative in criminal cases). Sherry would have found the same things if she had read the opinions of Justice Tom Clark or any number of other conservative jurists.

I have the same reaction to the suggestion by Frank Michelman, made in the course of a minute examination of one opinion of Justice O'Connor's, that her use in that case of a "balancing test" may reflect a distinctively feminine outlook.⁴¹ Many is the male jurist who has been drawn to balancing tests; indeed, such attraction is one of the defining characteristics of the pragmatic, instrumental, or "realist" style of judging. I challenge Sherry and Michelman to pick out Justice O'Connor's opinions in a blindfold test; I find nothing distinctively feminine in the style or content of her opinions.

Leslie Bender suggests that a feminist tort law would replace the "reasonable man" with the "caring neighbor."⁴² This suggestion misunderstands the significance of the "reasonable man" (or, as it is now more often and more appropriately referred to, the "reasonable person") rule in tort law. Its significance lies in preventing tortfeasors (or victims of torts) from arguing that while the average person could have avoided the accident, the actual party in the case could not have done so, because he had a below-average capacity to take care. I do not understand Bender to be quarreling with this result. Her point rather is that in deciding how much care is optimal, we should suppose that potential injur-

⁴⁰ Sherry, 72 Va L Rev at 543 (cited in note 34).

⁴¹ See Frank I. Michelman, *The Supreme Court 1985 Term - Foreword: Traces of Self-Government*, 100 Harv L Rev 4, 17 n 68, 32-36 (1986).

⁴² See Bender, 38 J Legal Educ at 30-32 (cited in note 34).

ers are not completely strangers to their potential victims but are mildly altruistic toward them (a caring neighbor is more altruistic than a stranger but less so than a close relative). However, people are what they are; most neighbors are not caring, and most accident victims are not neighbors. Human nature will not be altered by holding injurers liable for having failed to take the care that a caring neighbor would have taken. The only effect of adopting Bender's proposal would be to shift negligence liability in the direction of strict liability.⁴³ Her "caring neighbor" is an unnecessary step in the analysis. Bender might as well argue directly for strict liability on the ground that it is the more altruistic regime than negligence.

Is it? Strict liability is sometimes defended on the ground that it provides more compensation to more accident victims. This is a partial analysis. Strict liability can also result in higher prices, and the burden may be borne by consumers. The net distributive impact is unclear. If these complications are ignored, maybe a feminine outlook on law could be expected to stress compensation—obviously Bender associates altruism with women. On the other hand, strict liability is more rule-like, less standard-like, less contextualist, less sensitive to the particulars of the individual accident, than negligence is; in that respect it is the more masculine standard. Maybe Gilligan's ethic of care cannot be made the basis for a coherent feminist jurisprudence. And if it can be, the result may not be anything distinct from old-fashioned American legal realism,⁴⁴ provided we understand that altruism is a feature of some but not all versions of legal realism. Both Holmes and Cardozo were realists, but only Cardozo was a liberal (in the modern, not classical, sense). Plenty of male jurists have worn their hearts on their sleeves.

A recent article by Robin West articulates a slightly different

⁴³ To illustrate, suppose an accident having expected cost of \$100 could be prevented only by an expenditure of \$110 on care. Then the failure to prevent the accident would not be negligent, and under normal principles of tort liability the injurer would not be liable to his victim. But presumably a caring neighbor would go the extra step to prevent the accident (at least if the victim was not fully insured against its consequences), so under Bender's proposal the injurer would be liable if he failed to prevent the accident. But liability would not (except in special circumstances) induce him to take the extra care, which by definition would cost more than the expected accident; he would rather pay the occasional judgment. Liability in such a case would just make negligence liability strict liability.

⁴⁴ Except that the legal realists were for the most part not interested in sexual bias in the legal system. A notable exception, however, was Holmes's friend—like Holmes, a founder of legal realism—Nicholas St. John Green. See note 22. An interest in such bias is a defining characteristic of all forms of feminist jurisprudence.

version of feminist jurisprudence.⁴⁵ She begins by describing a formalistic conception of law that she calls "legal liberalism" (critics of liberalism like to assume that liberalism depends on a formalistic approach to law); and she stresses the importance that the legal liberal ascribes to individual liberty as a value served by law and the legal liberal's dread of having his individuality submerged in the community. The radical males of the critical legal studies movement, she goes on to explain, relabel individuality as alienation and turn it from an object of longing to one of dread; and relabeling annihilation as connection, they perform a similar inversion of the liberal's dread. Women, however, differ fundamentally from men in that their basic experience is not of individuality but of connection because of pregnancy and breast-feeding, because women are raised primarily by the parent of the same sex as theirs, and because women are penetrated, rather than penetrating, in sexual intercourse. The liberal feminist, who is basically satisfied with this order of things, replaces the liberal legalist's value of autonomy with the value of intimacy and the liberal legalist's dread of annihilation with a dread of separation. The radical feminist, however, longs for individuality (unlike the male radical) and dreads not alienation but invasion, intrusion.⁴⁶

Here we may pause and consider whether any of this is true. That is a large subject, to which I cannot begin to do justice here. My tentative view is that there are only two significant (both probably innate) differences, on average (as always a very important qualification), between men and women, in addition to the obvious differences in primary and secondary sexual characteristics. First, women tend to be less aggressive than men. Second, they tend to be more devoted to their children. As Gilligan puts it in a recent article, "stereotypes of males as aggressive and females as nurturant, however distorting and however limited, have some empirical claim. The overwhelmingly male composition of the prison population and the extent to which women take care of young children cannot readily be dismissed as irrelevant to theories of morality or excluded from accounts of moral development. If there are no sex differences in empathy or moral reasoning, why are there sex differences in moral and immoral behavior?"⁴⁷ These differences

⁴⁵ See West, 55 U Chi L Rev 1 (cited in note 34).

⁴⁶ These relationships are summarized in a table in *id* at 37. Notice that West has in effect divided what I am calling "fourth stage" feminism into a liberal and a radical variety. One might similarly divide legal realism into conservative, liberal, and radical varieties.

⁴⁷ Carol Gilligan and Grant Wiggins, *The Origins of Morality in Early Childhood Rela-*

could explain the greater attachment that the average man appears to have to the job market than the average woman.

But what, if any, implications these differences have for the law—beyond the trivial conjecture that women are less likely to be excessively combative in litigation or to be willing to work the absurd hours that are demanded of partners and associates at some law firms—are obscure. Nor are these the differences that interest West. But her idea that “connectedness” is the defining characteristic of the female experience, and her attribution of this characteristic to the female role in reproduction and child-rearing, are neither well supported by empirical evidence nor, on the whole, especially plausible. Most women do not appear to lack a sense of themselves as individuals; nor is that sense diminished by pregnancy and breast-feeding. The point about penetration is particularly unconvincing; it would make as much sense to describe the female as ingesting as it does to describe the male as penetrating.

The fact that girls are raised primarily by the parent of the same sex, and boys primarily by the parent of the opposite sex, is a somewhat more plausible, though speculative, ground for thinking that boys may grow up to be more individualistic than girls.⁴⁸ So if men assume a greater role in child-rearing, the male and female outlooks may become more convergent. I expect they will become more convergent anyway, as more and more women participate in the labor force.

However the large questions are answered, it seems that West's ambitions for feminist jurisprudence are, at least in the article under discussion, relatively modest ones. She doesn't aspire to make law feminist, either in Gilligan's or Sherry's or Bender's sense, or in West's own version of Gilligan's thesis. Mainly she wants the law to become more protective of women's interests by

tionships, in Jerome Kagan and Sharon Lamb, eds, *The Emergence of Morality in Young Children* 277, 278-79 (University of Chicago Press, 1987). Notice that the authors stop short of describing these differences as genetic; nor need I so describe them in order to make my point. For evidence supporting (with some qualifications) the passage quoted in the text, see June Machover Reinisch and Stephanie A. Sanders, *A Test of Sex Differences in Aggressive Response to Hypothetical Conflict Situations*, 50 *J Personality & Soc Psych* 1045 (1986); Alice H. Eagly and Valerie J. Steffen, *Gender and Aggressive Behavior: A Meta-Analytic Review of the Social Psychological Literature*, 100 *Psych Bulletin* 309 (1986); Alice H. Eagly and Maureen Crowley, *Gender and Helping Behavior: A Meta-Analytic Review of the Social Psychological Literature*, 100 *Psych Bulletin* 283 (1986). Also see note 37. The possibility that the differences stressed by Gilligan may be at least partly biological in character is discussed in Alice S. Rossi, *Gender and Parenthood*, 49 *Am Sociological Rev* 1 (1984).

⁴⁸ See Judith Lorber, et al, *On "The Reproduction of Mothering": A Methodological Debate*, 6 *Signs* 482 (1981).

recognizing the vulnerabilities that the woman's sense of connectiveness creates.⁴⁹ West wants lawyers, judges, and legislators to understand women's distinctive experience, just as blacks or Jews or Asians or Mormons want the law to be sensitive to their own experience. A libertarian can hardly quarrel with this aspiration—provided that West has identified what is indeed distinctive in women's experience. But the implications for jurisprudence are limited. Beyond that, it appears that West wants the legal system to be more empathetic to all marginal groups, and again there can be no quarrel with this desire. But the polarity between empathetic, equitable, discretionary, situation-specific justice, on the one hand, and the "rule of law" virtues of neutrality and "ruledness," on the other, is far older than feminist jurisprudence.

Conservative feminism takes a more cautious stance on issues of concern to women than radical or liberal feminism (I mean "liberal" in the modern sense, for the libertarian considers himself or herself the true, the classical, "liberal"). But I believe that it has much to offer women—if only a warning to consider carefully the indirect effects of policies ostensibly favoring women—and that it deserves a greater voice in the feminist chorus.

⁴⁹ See West, 55 U Chi L Rev at 58-72 (cited in note 34).

